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CASE NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1980 TERM

SECURITY MANAGEMENT CO., INC.
AND BRUCE R. DAVIS,

PETITIONERS

VS.

JACK ROTHENBERG AND
SHIRLEY ROTHENBERG,

RESPONDENTS

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

(1) Did the district court abuse its discretion in dispatching for review, pursuant to Federal Rule of Civil Procedure 54(b), a ruling granting a summary interlocutory adjudication on a pendent state law claim, while leaving the federal claim pending in a case in which diversity did not exist, federal jurisdiction existing soley on the basis of Section 27 of the Securities Exchange Act of 1934?

(2) Does a proper exercise of discretion require a district court to provide a written statement of reasons for granting certification of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure?

(3) Is the federal court of appeals ruling on the contract of guaranty in conflict with a ruling by the Georgia

Court of Appeals in a case in which the Georgia Court of Appeals had before it the same two contracts of guaranty as are at issue in this case and therein affirmed a grant of summary judgment to petitioners?

(4) In view of the related Georgia Court of Appeals decision and its policy implications, did the federal court of appeals err in refusing to stay its hand so as to afford the Georgia courts the opportunity to construe the two contracts in a declaratory judgment action instituted by petitioners after rendition of the decision by the federal court of appeals, but during the pendency of the motions for rehearing?

(5) Did the federal court of appeals err in refusing to certify questions to the Georgia Supreme Court so as to obtain guidelines for construing the

contracts in view of a related decision by the Georgia Court of Appeals which was based on public policy considerations?

LISTING OF ALL PARTIES

The plaintiffs in the district court are Jack Rothenberg and Shirley Rothenberg. The defendants are Security Management Co., Inc., Sidney I. Rose, George S. Stern, Bruce R. Davis, Harvey U. Rubin, and Sidney I. Rose and George S. Stern d/b/a Rose & Stern, a Georgia partnership. Only Bruce R. Davis and Security Management Co., Inc. were named defendants on the state law claim which was dispatched by the district court pursuant to Rule 54(b). Accordingly, Security Management Co., Inc. and Bruce R. Davis were the appellants in the Court of Appeals in the Fifth Circuit and Jack Rothenberg and Shirley Rothenberg were the appellees.

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The opinions and orders of the Court of Appeals for the Fifth Circuit appear in the Appendix hereto. The opinion of the Court of Appeals for the Fifth Circuit is reported at 617 F.2d 1149 (5th Cir. 1980). The opinions and orders of the United States District Court for the Northern District of Georgia relevant to the appeal also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 29, 1980. A timely motion for rehearing was denied on July 22, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant Federal Rule of Civil Procedure is Rule 54(b) which states:

> "(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates

fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The relevant Georgia Code Section is Georgia Code Section 22-511(a)(1) which states:

"(a) The board of directors of a corporation may, from time to time, declare and the corporation thereupon shall pay dividends on its outstanding shares in cash, property, or its own shares, except when the corporation is insolvent or when the payment thereof would

render the corporation insolvent or when the declaration or payment thereof would be contrary to any restrictions contained in the articles of incorporation, and subject to the following provisions:

(1) Dividends may be declared and paid in cash or property only out of the unreserved and unrestricted earned surplus of the corporation, or out of the unreserved and unrestricted net earnings of the current fiscal year, computed to the date of declaration of the dividend, or the next preceding fiscal year."

STATEMENT OF THE CASE

Bruce R. Davis ("Davis") was an individual involved in real estate development and apartment management in the metropolitan Atlanta, Georgia area through his solely owned company,

Security Management Co., Inc. ("Security Management"). In the summer of 1972, a stock package was offered to certain investors in the form of equal number of shares in Security Management Co, Inc. and in a new corporation Security Investments Properties, Inc. ("Properties"). For each $50,000.00 invested, individuals would receive 8,000 shares of stock in Security Management, 8,000 shares of class "C" stock in Properties, and a guaranty of dividends from Properties. Under the terms of the guaranty, Davis and Security Management guaranteed that Properties would pay dividends to its shareholders. Dividends were paid by Properties to its shareholders in accordance with the guaranty until a Chapter XI proceeding was filed by Properties in October, 1974. Properties was eventually adjudicated a bankrupt.

Jack Rothenberg was one individual who acquired one unit of the stock package for $50,000.00. He transferred the stock to his wife, Shirley Rothenberg, in 1974.

In January 1977, the Rothenbergs filed this action in the district court seeking recovery on a eight count complaint. Upon motion by the defendants, three federal securities claims (those based on §12(1), §12(2), and §17(a) of the Securities Act of 1933) were dismissed in July of 1977. The two Georgia securities claims were dismissed in November of 1977. The §12(1) and §12(2) claims, as well as the two Georgia securities claims, were dismissed as barred by the applicable statutes of limitations. The only federal claim left pending was predicated on §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5

promulgated pursuant thereto. Jurisdiction over that federal claim was predicated on §27 of the Securities Exchange Act of 1934. The only other claims left pending were predicated on the Georgia law of fraud and deceit and a claim on the guaranty against Davis and Security Management. Jurisdiction over those two claims was allegedly predicated on the concept of pendent jurisdiction, since no diversity exists between the parties.

After granting a summary judgment against Davis and Security Management on the guaranty claim in January of 1978, the district judge, without supplying a statement of reasons, directed the clerk to enter judgment on that count on July 3, 1978. (App. at 24a-25a). The federal claim predicated on Rule 10b-5 was left pending along with the

claim for fraud and deceit under the Georgia law.

The Court of Appeals for the Fifth Circuit in an opinion handed down on May 29, 1980, affirmed the judgment of the district court. (App. at 1a-10a). The Court of Appeals ruled that it was within the discretion of the district judge to determine whether he should provide a statement of reasons for entering a Rule 54(b) certification. (App. at 4a). The Court of Appeals also ruled that the district judge did not abuse his discretion in entering the certification even though the district judge was made aware at the time of the entry of the certification an issue identical to the one presented to him was being appealed to the Court of Appeals of Georgia by other shareholders of

Properties who had sued Davis and Security Management on the guaranty in a state court and against whom a summary judgment had been entered. The Fifth Circuit ruled that the decision which was subsequently handed down by the Court of Appeals of Georgia did not interpret both of the documents (Document "A" and Document "B") which had surfaced in the litigation, even though the Georgia trial court had unequivocally ruled on the basis of both documents. (App. at 6a-9a). Without citing a single Georgia case and without specifically discussing the ramifications of the Georgia Court of Appeals case, the Fifth Circuit construed Document "B" and concluded there was liability on the part of Davis and Security Management. (App. at 8a-9a).

On June 9, 1980, Davis and Security Management instituted an action against

Jack Rothenberg and Shirley Rothenberg in the Superior Court of DeKalb County, Georgia, seeking a declaratory judgment with respect to both Document "A" and Document "B". In addition to the motion for rehearing, Davis and Security Management moved the Court of Appeals for the Fifth Circuit to stay its hand pending resclution of the declaratory judgment action. In addition, Davis and Security Management on motion for rehearing argued that the Fifth Circuit should certify questions to the Supreme Court of Georgia if it did not enter a stay. The motion to stay was denied on July 21, 1980. (App. at 11a-12a). The motions for rehearing and rehearing en banc were denied on July 22, 1980. (App. at 28a-29a). Throughout this litigation and that in the Georgia courts, petitioners have used the terms Document "A" and Document

"B". A copy of Document "A" appears in the Appendix. (App. at 39a-50a). A copy of Document "B" also appears in the Appendix. (App. 30a-38a). In its opinion, the Fifth Circuit used the term Guaranty rather than Document.

REASONS FOR GRANTING THE WRIT

1. The decisions below conflict with decisions of the United States Supreme Court as to the proper interpretation of Rule 54(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides that a district court may direct entry of a final judgment as to one or more but fewer than all of the claims in a case involving multiple claims or multiple parties only on an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The role of the district court under

Rule 54(b) is to act as a "dispatcher". Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956). The decision to release for final appeal is vested in the discretion of the district court, but is subject to review for an abuse of discretion. Sears, Roebuck & Co. v. Mackey, supra at 437. In reviewing a Rule 54 certification by a district court, the function of the court of appeals requires two steps. The first step is to scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. Curtiss-Wright Corp v. General Electric Co. __ U.S. __, 64 L.Ed. 2d 1, 12 (1980). If the court of appeals determines that the juridical concerns are satisfied, then the court of appeals should show

substantial deference to the discretionary judgment of the district court. Curtiss-Wright Corp. v. General Electric Co., supra.

In the case at bar, the district judge confronted the question whether to certify the ruling on the guaranty claim while leaving pending the federal claim on the basis of Rule 10b-5. Petitioners contend that a Rule 54(b) certification of a pendent state claim would rarely, if ever, be a proper exercise of discretion by a district judge. Certainly it was not under the facts of this case.

The district court had the constitutional power to adjudicate the state law guaranty claim only if the guaranty claim and the 10b-5 claim grew from a common nucleus of operative facts and if the claims were such that a plaintiff would ordinarily be expected to try them all in one judicial

proceeding. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). If jurisdiction existed to adjudicate the guaranty claim, then it must follow that the guaranty claim and the 10b-5 claim arose from the same facts and were claims such that a plaintiff would ordinarily be expected to try them in one proceeding.

In determining whether to certify pursuant to Rule 54(b), it is incumbent upon the district court to examine the relationship of the adjudicated claims to the unadjudicated claims. Cold Metal Process. Co. v. United Eng. & Fdry. Co., 351 U.S. 445, 452 (1956). Proper exercise of discretion further requires that the relationship between claims be examined so as to prevent piecemeal review in cases which should be reviewed only in single units. Curtiss-Wright

Corp, supra. In the case at bar, the guaranty claim and the 10b-5 claim arose from the same factual nucleus and were such that a plaintiff would be expected to try them in one case. Yet, the district court entered a Rule 54(b) certification on the guaranty claim and the court of appeals affirmed this exercise of discretion. The necessary implication from the certification is that 10b-5 claims and the guaranty claim did not arise from the same factual nucleus and should not be tried in the same proceeding. The certification was clearly an abuse of discretion under the applicable standards.

In addition to the factual relationship between the claims, the election of remedies doctrine is a relevant factor in determining whether or not the Rule 54(b) certification was proper. The

amount of the judgment on the guaranty ($40,381.60) was the present value of the difference between the amount invested ($50,000.00) and the total amount of dividends ($8,625.00) paid before the bankruptcy proceeding was commenced. In opposing the motion on the guaranty and the request for certification, petitioners argued to the district court that the Rothenbergs had elected to rescind the stock purchase by praying for return of their investment in the complaint and by asserting the claims under §12(1) and §12(2). See Wigand v. Flo-Tek, Inc., 609 F.2d 1028, 1035-1036 (2nd Cir. 1979). The district court ruled that the Rothenbergs had utilized Federal Rule of Civil Procedure 8, which permits alternative pleading, so there had been no binding election to rescind. (App.at 15a-16a). Even if the district court

were correct in granting the summary judgment motion on the guaranty, the entry of the Rule 54(b) certification before adjudication of the 10b-5 claim was improper. A judgment on both the guaranty and the 10b-5 claim would result in double recovery. The ruling on the guaranty should have remained in the breast of the district court until adjudication of the 10b-5 claim. After such adjudication, the Rothenbergs could elect which judgment they wished to be entered should they also prevail on the 10b-5 claim.

Another juridical concern is the relationship between the guaranty claim and the 10b-5 claim with respect to the measure of damages. The Rothenbergs contend in the district court they seek actual damages. The measure of actual damages is the difference between the

price paid and the fair market value of the security at the time of the transaction. See Nor-Tex Agencies, Inc. v. Jones, 482 F.2d 1093, 1097 (5th Cir. 1973). The recovery is reduced by any monies received on the investment. See Esplin v. Hirschi, 402 F.2d 94, 105 (10th Cir. 1968); Fox v. Glickman Corp., 253 F. Supp. 1005, 1010 (S.D. NY 1966).

In the case at bar, the amount of the judgment on the 10b-5 claim, if the Rothenbergs are successful, could in no case exceed the amount of the judgment on the guaranty. Actual damages could not exceed the amount invested ($50,000.00) reduced by the amount of the dividend payments ($8,625.00). That is the amount of the judgment on the guaranty. If the stock had value at the time of purchase, then the recovery

on the 10b-5 claim would be less than the amount of the judgment on the guaranty.

What is crucial for Rule 54(b) purposes is that the effect of entry of the judgment on the guaranty is to extinguish the 10b-5 claim since a judgment on the 10b-5 claim could in no event exceed the amount of the judgment already entered. See Aboussie v. Aboussie, 441 F.2d 150, 157 (5th Cir. 1971). No actual damages under 10b-5 can exist if the guaranty judgment stands. If no actual damages can be recovered, the 10b-5 claim is extinguished as is the basis for federal jurisdiction. See Wolf v. Frank, 477 F.2d 467, 478-479 (5th Cir. 1973).

The final juridical factor that should have been weighed by the district court in determining whether to enter

a Rule 54(b) certification, and by the court of appeals in determining whether that certification was an abuse of discretion was the status of Pisano v. Security Management Co. Inc., 148 Ga. App. 567, 251 S.E. 2d 798 (1978). At the time of certification the district court had been informed by documents placed in the record that the Pisano case was being appealed to the Georgia Court of Appeals. That case involved the same two documents as are at issue in the case at bar. Rather than holding the decision on the guaranty in its breast and proceeding to adjudicate the 10b-5 claim, the district court dispatched the ruling on the guaranty claim as a final judgment, thus affording no opportunity for reconsideration of the ruling upon an authoritative determination of the issues by the Georgia

courts. The conclusion by the court of appeals that Pisano had no substantive significance is based on hindsight, and was not a conclusion which the district judge could have reached in the exercise of discretion at the time of the certification.

The Rule 54(b) certification entered on this pendent state claim was done routinely and without reflection. The request was made by counsel for the Rothenbergs by means of a letter to the district judge. There is no indication that the district judge considered the juridical concerns referenced in Curtiss-Wright, since there is no written statement of reasons supporting the conclusion reached. (App. at 24a-25a). The district judge who entered the certification was not the one to whom the case was originally assigned, and he was not the judge who entered the order dismissing

three of the four federal securities claims. His opportunity for familiarity with the case was limited. The factual and legal relationship between the claims, as well as the existence of the opportunity for an authoritative resolution in the state court, all compel the conclusion that it was an abuse of discretion to enter the Rule 54(b) certification. The decisions by the district court and the court of appeals are in conflict with Curtiss-Wright Corp. v. General Electric Co., supra, Cold Metal Process Co. v. United Eng. & Fdry. Co., supra, and Sears, Roebuck & Co. v. Mackey, supra.

2. The decisions below are in conflict with a case decided last term by the United States Supreme Court and are in conflict with decisions from the Second, Third, and Seventh Circuits.

In Curtiss-Wright Corp. v. General Electric Co. __ U.S. __, 64 L.Ed. 2d 1 (1980) this Court reversed a ruling by the Third Circuit that a district court had abused its discretion in entering a Rule 54(b) certification. In reaching that conclusion, however, this court noted that the district court had provided a written statement of reasons supporting its decision to certify and had identified the relevant factors supporting its conclusion. Curtiss-Wright Corp. v. General Electric Co., supra at 64 L.Ed 2d 9. Thus, while the Supreme Court did not explicitly hold a written statement of reason identifying relevant factors was required, it is implicit from the opinion in Curtiss-Wright Corp. that a proper exercise of discretion requires an articulation of the reasons and an evaluation of the relevant factors.

In this case, the Court of Appeals for the Fifth Circuit has expressly held that a brief, reasoned statement supporting that a Rule 54(b) certification is not required from a district court. (App. at 4a). This holding is in conflict with U.S. General, Inc. v. City of Joliet, 598 F.2d 1050, 1051 (7th Cir. 1979), Arlinghaus v. Ritenour, 543 F.2d 461, 463-464 (2nd Cir. 1976), Gumer v. Shearson, Hammill & Co., Inc., 516 F.2d 283, 285-286 (2nd Cir. 1974), and Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d. 360, 361-367 (3rd Cir. 1975).

The principal reasons for requiring a written statement are set forth in Arlinghaus v. Ritenour, supra. As noted in that opinion, if the district judge is not required to put his reasons in writing, the press of business in the

district court may well result in Rule 54(b) certifications being granted routinely and without the active exercise of discretion. If these certifications are granted routinely, then the strong federal policy against piecemeal appeals would be frustrated. Requiring a written statement not only benefits the reviewing court, but it also benefits the district judge in reaching his decision. The district judge in putting his reasons on paper may find that what might at first appear to be a proper case for certification is not one at all. When the reasons are committed to paper, the reviewing court is aided in discharging its function of determining if there has been an abuse of discretion. Arlinghaus v. Ritenour, supra at 464.

Petitioners contend certiorari should be granted to resolve the conflicts

in the circuits. In addition, certiorari is desirable on this issue so district judges will not misinterpret Curtiss-Wright v. General Electric Corp. and commence entering Rule 54(b) certifications without committing their reasons to writing. The long standing policy against piecemeal review should not be easily frustrated.

3. The decisions below are in direct conflict with an authoritative decision rendered by the Georgia Court of Appeals.

There has been no dispute in any of the proceedings that Georgia law applied to the guaranty claim since the alleged jurisdictional basis was the concept of pendent jurisdiction. Clearly, there could have been no argument that Georgia law would not control. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); First Southern

Fed. Sav. v. First Southern Sav., 614 F.2d 71, 73 (5th Cir. 1980); Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 541 (2nd Cir. 1956). The dispute in this case has centered around determining Georgia law.

In its opinion, the Fifth Circuit appears to acknowledge implicitly that the ruling in Pisano v. Security Management Co. Inc., 148 Ga. App. 567, 251 S.E. 2d. 798 (1978) would have been authoritative if the Georgia Court of Appeals had ruled on the basis of both Document "A" and Document "B". (App.at 6a). Such acknowlegement is consistent with Supreme Court precedents on the binding nature of rulings by intermediate state appellate courts on issues of state law where there is no federal interest at stake. Commissioner v. Bosch, 387 U.S. 456, 465 (1967); Stoner v. New

York Life Ins. Co., 311 U.S. 464 (1940); West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Six Companies v. Joint Highway District No. 13, 311 U.S. 180 (1940). The issue worthy of certiorari in the case at bar is that the Fifth Circuit has misconstrued the opinion of the Georgia Court of Appeals and has sanctioned a result which is directly contrary to the pronounced public policy of the state of Georgia. Such a ruling necessarily impacts well established principles of federalism.

The Pisanos and the Rothenbergs sued on the same two documents. The state trial judge and the district judge ruled on the basis of both documents. The Court of Appeals of Georgia and the Fifth Circuit heard the same arguments. Indeed, counsel for the Rothenbergs appeared before the Georgia Court of

Appeals in the Pisano Case by way of an amicus curiae brief. See Pisano v. Security Management Co. Inc., 148 Ga. App. 567, 570 (1978). The decisional base of the Fifth Circuit's opinion, i.e. that the opinion in Pisano did not treat Document "B", was an issue argued by counsel for the Pisanos on motion for rehearing to the Georgia Court of Appeals and on application for certiorari to the Georgia Supreme Court. Clearly, neither the Georgia Court of Appeals nor the Supreme Court of Georgia consider the issue to have any merit since the motion for rehearing was denied and certiorari was not granted.

The Fifth Circuit reached its conclusion that the Georgia Court of Appeals did not rule on the basis of Document "B" because certain language in the opinion stated the obligation of the guarantor

was to advance money to the corporations sufficient to pay the dividends, whereas Document "B" contained language which stated the guarantors were to pay any short fall in the dividends directly to the investors of record. Such a distinction has no substantive merit when the rationale of the Pisano opinion is examined, sanctions a result which is directly contrary to the result reached in Pisano, and contains the implicit suggestion that the Georgia Court of Appeals did not rule on all the issues before it.

In its opinion, the Georgia Court of Appeals states that it construed the evidence adduced by both parties and examined the documents. Pisano, supra at 567 and 569. The court states it considered "...seven different predicates utilized by the trial court in granting

summary judgment to Davis and [Security] Management". Pisano, supra at 568. The opinion contains no language limiting its affirmance in any way. Rather, it focuses on the concepts involved and reaches its result taking into consideration the public policy of the state of Georgia.

The opinion of the panel reflects their fundamental misunderstanding of the Georgia law concerning guaranties. The misconception is not surprising since none of the Fifth Circuit panel is Georgia trained, and the Georgia trained district judge did not have benefit of Pisano. It is hornbook law in Georgia that a guaranty involves three parties, i.e., the guarantor, the principal, and the beneficiary (or obligee). GEORGIA ENCYCLOPEDIA OF LAW, Guaranty and Suretyship §3. Since a

guaranty involves a promise to answer for the obligation of another, the obligation of the guarantor is discharged if the principal obligation is extinguished. GEORGIA ENCYCLOPEDIA OF LAW, Guaranty and Suretyship §24; Acker v. Corinthian Condominium Corp., 145 Ga.App. 288, 291-292, 243 S.E. 2d 683 (1978). The obligations of a guarantor are strictly construed and will not be extended by implication. Sitzer v. Lang, 145 Ga. App.159, 243 S.E. 2d 95 (1978).

In the case at bar, the obligation of the guarantors under either document was direct since both documents provided for a direct right of action against the guarantor. (App. at 36a and 48a). Since the direct right of action existed, it makes no difference in the Pisano analysis whether the language of the document specified the money for the

dividends was to be paid directly to the investors by the guarantors or advanced by the guarantors to the company and then paid to the investors. The direct or indirect payment of the dividends by the guarantors would not affect the guarantors' rights against the company. In either case, the guarantors would have a claim for reimbursement against the company, as principal. GEORGIA ENCYCLOPEDIA OF LAW, Guaranty and Suretyship §28.

With an understanding of the principles of Georgia law on guaranties, the rationale of the Pisano opinion becomes clear. The Pisano court was referring to the entire bundle of rights held by the Pisanos, and hence did not need to refer to the different documents as separate guaranties. Davis and Security Management, as guarantors, were obligated to pay

to the Pisanos dividends, if the dividends were not paid by Properties. What discharged the obligation to pay the dividends was the insolvency and bankruptcy of Properties which made it legally impermissible for Properties to pay dividends. Georgia Code §22-511(a).

The public policy considerations in the Pisano opinion arose as a result of the arguments made by the Pisanos. They contended, as do the Rothenbergs, that the bankruptcy of the corporation and its resultant legal inability to pay dividends did not result in a discharge on the guaranty since the bankruptcy of the principal does not generally discharge the guarantor. See Texaco, Inc. v. Hurt, 118 Ga. App. 413, 164 S.E. 2d 278 (1968). The Georgia Court of Appeals' answer to that contention was that such a construction of the

documents would mean that the Pisanos, the Rothenbergs, and others holding that class stock were creditors of the corporation rather than stockholders, and a thorough examination of the documents reflected they were stockholders, not creditors. The Georgia Court of Appeals ruled the public policy of Georgia precluded converting the plain language of the documents into a loan contract which would result in converting stockholders into creditors in the event of corporate insolvency. Pisano, supra at 569-579.

The effect of the opinion by the Fifth Circuit is to sanction a result which is in conflict with the pronounced public policy of Georgia. The documents in question, according to the Georgia Court of Appeals, should not be construed to turn the shareholder agreements and guaranty contract into a loan agreement.

That is precisely what the Fifth Circuit has done.

Petitioners respectfully urge the grant of the writ of certiorari to correct the misinterpretation of Georgia law. The Fifth Circuit opinion resurrects the ghosts sought to be laid to rest by Erie Railroad Company v. Tompkins 304 U.S. 64 (1938). Certiorari should be granted to avoid needless friction between the federal and Georgia court systems.

4. The refusal of the Fifth Circuit to certify questions or to enter a stay is in direct conflict with decisions of the United States Supreme Court.

After the panel rendered its decision, the petitioners filed a state court action seeking a declaratory judgment with respect to both Document "A" and Document "B". Petitioners also moved

the Fifth Circuit to stay its hand pending resolution of the declaratory judgment action. The motion was denied on July 21, 1980.

As was argued by petitioners on rehearing, certification would have been one proper alternative. Lehman Brothers v. Schein 416 U.S. 386 (1974). The Fifth Circuit panel contained no lawyers trained in Georgia law. The Georgia-trained district judge did not have benefit of the Pisano opinion at the time he rendered his ruling, so he could not assess the policy implications of the decision. Further, it is not unheard of for the Fifth Circuit to misconstrue state law. See Lehman Brothers v. Schein 416 U.S. 386, fn. 6 (1974); Brown, Certification-Federalism in Action, 7 CUMBERLAND L. REV. 456 (1977). Certification is available in Georgia and has

been utilized by the Fifth Circuit. Miree v. United States, 242 Ga. 126, 249 S.E. 2d 573 (1978).

Less cumbersome than a certification would be the entering of a stay to afford the Georgia courts the opportunity to provide an authoritative resolution to the state law issues. Many of the general policy arguments for granting a stay in a case involving issues of state law are set forth by Judge Brown of the Fifth Circuit in his concurring opinion in United States Life Insurance Company v. Delaney 328 F.2d 483, 485-489 (5th Cir. 1964)(en banc), and in his concurring and dissenting opinion in W.S. Ranch Co. v. Kaiser Steel Corporation, 388 F.2d 257, 262-267 (10th Cir. 1967), reversed Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968)

(per curiam). This case goes one step further. Since there is no independent federal jurisdiction for the state law claim (diversity is not present), the federal courts are under no duty to adjudicate the guaranty claim. The exercise of pendent jurisdiction is a matter of discretion; needless decisions of state law should be avoided to promote comity and justice between the litigants since only state courts can authoritatively determine state law. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The state forum (the Superior Court of DeKalb County, Georgia) is available which can provide an authoritative resolution. The Pisano decision reflects important policy concerns of the state of Georgia; the federal court of appeals has sanctioned a result in contravention of that policy. The federal judiciary should not preclude a resolution of state policy concerns by the Georgia courts.

The denial of the motion for a stay is in direct conflict with Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) (per curiam). Georgia courts can provide a speedy resolution to the state law issues and should be allowed to do so.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Robert A. Elsner
Counsel for Petitioners

J. Timothy White
J. Michael Lamberth
On the Petition

[APPENDIX FOLLOWS]

Jack ROTHENBERG and Shirley Rothenberg, Plaintiffs-Appellees,

v.

SECURITY MANAGEMENT CO., INC., et al., Defendants-Appellants.

No. 78-2631.

United States Court of Appeals

Fifth Circuit

May 29, 1980.

Appeal from the United States District Court for the Northern District of Georgia.

Before GOLDBERG, CHARLES CLARK and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

In affirming the instant appeal, we write to clarify two points, one procedural and one substantive.

1. Rule 54(b) Certification

[1] Davis and Security Management

Co., Inc., urge the following as the law of this circuit: "In entering a rule 54(b) certification [Fed.R.Civ.P. 54(b)], a district court should include a statement explaining its reasoning for determining [that] there is no just reason for delay." In support of this proposition, they cite Huckeby v. Frozen Food Express, 555 F.2d 542, 550 (5th Cir. 1977), and Schwartz v. Compagnie General Transatlantique, 405 F.2d 270, 274-275 (2d Cir. 1968). Neither authority supports this assertion. In the disposition portion of Huckeby, this circuit declined to review the dismissal of a would-be intervenor's complaint in a Title VII action but pointed out that on remand the district court could be asked to determine whether rule 54(b) was applicable. Our mandate stated, "In the event that the district court decides to certify

its order for appeal, it should include a brief statement explaining why there is no just reason for delay. Gumer v. Shearson, Hammill & Co., Inc., 516 F.2d 283, 286 (2d Cir. 1974); Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d [360] at 364 [3d Cir.]." 555 F.2d at 550. Thus, in a case already subjected to extensive review, we found it appropriate in our mandate to require the inclusion of a brief statement of reasons if the district court on remand exercised its discretionary power to proceed under rule 54(b). We did not go as far as the Second and Third Circuits in the cases cited above as to "suggest" to district courts that they make a brief, reasoned statement in support of their determination in all rule 54 (b) certifications. See Gumer v. Shearson, Hammill & Co., Inc. 516 F.2d at 286.

Nor did we exercise our supervisory power to include Gumer's practice "as a requirement for all rule 54(b) certifications." Allis-Chalmers Corp. v. Philadelphia Electirc Co., 521 F.2d at 364.

Rule 54(b) contains no specific requirement that a district court include a statement explaining its reasoning for applying the rule. Huckeby did not intend to supplement the rule as a matter of general practice. The inclusion of such a statement is left to the discretion of the district court and is not imposed as a requirement in all cases. Thus, the district court was not in error in making the rule 54(b) certifications without such an explanatory statement. However, when the case is of such a nature that the reasons for the 54(b) certification are unclear, it may be necessary for

adequate appellate review to require that the district court's reasons be stated. What is said here is intended to encourage, not inhibit, such helpful explanations in any future cases, although we hold only that it is not a required procedure in this circuit at this time.

2. Interpretation of the Guaranty.

[2] Davis and Security Management Co., Inc., complain that the rule 54(b) certification in the instant case prevented the district court from knowing that the Georgia Court of Appeals would reach a contrary result in a case styled Pisano v. Security Management Co., Inc., 148 Ga.App. 567, 251 S.E.2d 798 (1978). The chronology shows that the district court below granted plaintiff's motion for partial summary judgment on January 26, 1978, and denied a motion for reconsideration on April 18, 1978. The State

Court of Fulton County entered its order and judgment in Civil Action No. 621029, styled Pisano, et al. v. Davis and Security Management Co., Inc., on May 12, 1978. The rule 54(b) certification in the instant case was made on June 30, 1978, after the district court had been advised that the Georgia decision in Pisano was on appeal. The Georgia Court of Appeals rendered its decision on November 14, 1978, and denied rehearing on December 20, 1978. The Supreme Court of Georgia denied certiorari on February 7, 1979.

Pisano would have substantive significance only if the Georgia court had authoritatively interpreted the legal meaning of the guaranty agreement on which the district court depended. We determine that it did not. Thus, there was no conflict between the decision of the Georgia Court of Appeals and the district court.

The controversy centers upon whether the Georgia adjudication interpreted the so-called B guaranty or limited its construction to the A guaranty only. The original complaint in Pisano was based upon the A guaranty only. Three days before the entry of the decision of the state court of Fulton County, the complaint was amended also to exhibit the B guaranty. The order and judgment of the Fulton County court was placed on three alternative grounds. The first was that plaintiffs acknowledged that neither guaranty was known to them at the time they purchased their stock. The court concluded initially that the lack or reliance meant that plaintiffs could not recover judgment on either document. The second alternative ground found no evidence in the record entitling plaintiffs to proceed on the B guaranty

and that the A guaranty alone entitled the defendants to summary judgment based upon the construction of that instrument. The third alternative ground viewed the A and B guaranty together and concluded that the defendants were entitled to judgment as a matter of law.

The language of the opinion of the Georgia Court of Appeals discusses and analyzes a single guaranty instrument, one that obligated the guarantors in the event of non-payment of a quarterly dividend to advance the corporation sufficient funds in the form of a loan to enable the company to pay the stipulated dividend. The Court of Appeals was describing the A guaranty only. The guaranty agreement relied upon by the district court in this case is obviously the B guaranty, which contained an obligation

directly from the guarantors to the investors, including the Rothenbergs.[1] Thus, there is no conflict between the ultimate resolution of the Georgia case and the decision in the court below.

All other points raised by the instant appeal are without merit.

AFFIRMED.

1. Guaranty B provides as follows:

GUARANTORS' OBLIGATION AS TO DIVIDENDS

The Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of the Company) that the Company will distribute an annual cash dividend of .5625 Dollars per share, payable quarterly, for each outstanding share of Classes B, C and D cumulative stock held by the Investors of record. If, during any such quarter, the Company does not distribute such an amount, and such amount is due pursuant the Articles of Incorporation of the Company, the Guarantors will, within thirty days after the end of such quarter, pay the Investors of record an amount equivalent to the difference between

the quarterly amount owed to said Investors and the dividends actually paid during that quarter. For the purpose of this paragraph the quarterly periods shall be computed from the beginning of the year following the incorporation of the Company.

Notwithstanding the foregoing, the Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of the Company) that the Company will, by December 31, 1972, have distributed as cash dividends an amount at least equal to .234375 Dollars, a sum equivalent to 5/12 of the annual dividend, for each outstanding share of Classes B, C and D cumulative stock held by the Investors of record. If the Company does not distribute such an amount, the Guarantors will, within thirty days after December 31, 1972, pay to the Investors of record an amount equivalent to the difference between .234375 per share, a sum equivalent to 5/12 of the annual dividend, and the dividends actually paid to the point of time.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-2631

JACK ROTHENBERG and
SHIRLEY ROTHENBERG,

Plaintiffs-Appellees,

versus

SECURITY MANAGEMENT CO.,
INC., ET AL.,

Defendants-Appellants.

July 21, 1980

Appeal from the United States District Court for the Northern District of Georgia

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Before GOLDBERG, CHARLES CLARK and THOMAS A. CLARK, Circuit Judges.

B Y T H E C O U R T :

IT IS ORDERED that appellants' motion to stay further appellate proceedings and issuance of mandate is denied.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JACK ROTHENBERG

and SHIRLEY ROTHENBERG

V. CIVIL ACTION

FILE NO. C77-151A

SECURITY MANAGEMENT CO., INC.;
SIDNEY I. ROSE; GEORGE S. STERN;
BRUCE R. DAVIS; HARVEY U. RUBIN;
and SIDNEY I. ROSE and GEORGE
S STERN d/b/a ROSE & STERN,
A Georgia Partnership.

(Filed January 27, 1978)

ORDER

This action arises from alleged violations of federal and Georgia securities laws. Court orders of June 30, 1977 and November 17, 1977 disposed of several motions, but the parties have returned to the court at this time for a disposition

of further difficulties.

1. Pending before the court is a motion for partial summary judgment. The focus of the motion is Count VIII of the complaint which concerns a guaranty executed by defendants Bruce R. Davis and Security Management Co., Inc. ("SMI")

The guaranties were executed on August 1, 1972. The first promises investors of record in Security Investment Properties, Inc. stock a return of ".5625 Dollars per share, payable quarterly." It provides further:

> If, during any such quarter, the Company does not distribute such an amount, and such amount is due pursuant to the Articles of Incorporation of the Company, the Guarantors will, within thirty days after the end of such quarter, pay to the Investors of record

> an amount equivalent to the difference between the quarterly amount owed to said Investors and the dividends actually paid during the quarter.

Plaintiffs allege Shirley Rothenberg, as investor of record in 8000 shares of common stock, actually received $8,625.00. Plaintiffs allege $50,000.00 was actually due under this guaranty and seek an award in this motion of $41,375.00.

Defendants Davis and SMI first argue that plaintiffs may not proceed on the guaranty because they have elected the remedy of rescission and restitution. Although plaintiffs may have sought recission and restitution while seeking to enforce this contract, Rule 8(a) Federal Rules of Civil Procedure clearly provides for the demand of alternative forms of relief. Defendants do not argue restitution has been made and

the bar to inconsistent relief would not arise as a defense to this motion.

Next, defendants point to the second guaranty which only obligates them to make loans to SIP in the event of SIP's inability to make the promised payments. Defendants note SIP has filed for bankruptcy and under the provisions of Ga. Code Ann. §22-511(a), an insolvent corporation may not pay dividends.

Whatever the merits of defendant's arguments as to the second guaranty, they have ignored their obligations under the aforementioned first guaranty. The obligation to make payment of the dividends is clear and unequivocal under the first guaranty. The two contracts are separate and independent and do not require reference to one in interpreting the other. The contract is plain and its construction is for the court.

Ga. Code Ann. §20-701. The inability to enforce one contract will not forestall enforcement of obligations on the other where the true intention is clear. See, Carsello v. Touchton, 231 Ga. 878, 880 (1974). ...

6. Accordingly, the motion for partial judgment as to Count VIII is GRANTED. The motion to compel production of documents is GRANTED. The motion to compel answers to interrogatories is GRANTED. The motion to withdraw as counsel is GRANTED. The Motions to amend are GRANTED.

SO ORDERED this 25th day of January, 1978.

/s/ Harold L. Murphy

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JACK ROTHENBERG and
SHIRLEY ROTHENBERG

v. CIVIL ACTION

FILE NO. C77-151A

SECURITY MANAGEMENT
CO., INC.; et al.

(Filed April 20, 1978)

ORDER

This action arises from alleged violations of federal and Georgia securities laws. On January 25, 1978, the court granted a motion for partial summary judgment and several discovery motions. These issues have now been disputed anew.

1. Pending before the court is

the motion for reconsideration of defendants Security Management Co. ("SMI") and Bruce R. Davis. Movants contend the document upon which the court based its grant of partial summary judgment was not properly authenticated and was not proper for consideration on the motion. It is clear, however, that a summary judgment will be upheld "where material introduced pursuant to that motion was uncertified, or otherwise inadmissible, and yet unchallenged". Davis v. Howard, 561 F.2d 565, 569 (5th Cir. 1977). See, Auto Drive-Away Co. v. I.C.C., 360 F.2d 446, 448 (5th Cir. 1966); Lawson v. American Motorists Ins. Co., 217 F.2d 724, 726 (5th Cir. 1954). Defendants' objections, however meritorious, have been waived.

Defendants contend an ambiguity was created by the existence of two

guaranties with small, yet potentially significant differences. Defendants contend the existence of these distinctions has created a jury question. The defendants are not supported by the law of Georgia in this contention, however. "Construction of written contracts, even if they are ambiguous, is a matter for the court." A jury issue arises only if the ambiguity remains after application of the relevant rules of construction. Hardin v. Great Northern Nekoosa, 237 GA. 594, 597 (1976); Chalkley v. Ward, 119 Ga. App. 227, 235 (1969).

The relevant rule of construction requires that two instruments executed at the same time, between the same parties, relative to the same subject matter, be taken as parts of the same agreement. See, Hardin, supra; Peerless Casualty Company v. Housing Authority, 228 F.2d 376,

381 (5th Cir.1955). The agreement before the court therefore requires the Guarantors (movants here) to lend Securities Management Properties, Inc. ("SMP") the amount necessary for SMP to satisfy it's dividend obligations. When SMP became insolvent, the payment of dividends was barred by law. Ga. Code Ann. §22-511)a). In this instance, the agreement provides for the payment of dividends by the Guarantors. It was the Guarantor's direct payment obligation the court was enforcing in making the grant of summary judgment. Other interpretations might be possible, but none would completely avoid the agreement the Guarantors strive so hard to ignore.

2. The defendants contend summary judgment is not proper in the full amount of $41,375.00 because of the majority

of this sum is not yet due. "Where a party bound by an executory contract repudiates his obligation before the time for performance, the other party has the option to treat the contract as ended so far as future performance is concerned, and to maintain an action at once for the damages occasioned by the breach." City of Royston v. Littrell Engr. Co., 87 Ga. App. 903,906 (1953). See also, Crosby v. Georgia Realty Co., 138 Ga. 746 (1912). The injured party is entitled to the recovery of his entire damages. Parker v. King, 68 Ga. App. 672, 674 (1942); Mendel v. Converse & Co., 30 GA. App. 549 (1923). The recovery plaintiffs have elected is the present value of the $41,375. See Parker, supra. The damages of $41,375 must be discounted to its present value at the legal interest rate of 7%. Ga. Code Ann. §57-101.

The owner of record of these shares is entitled to interest on the unpaid damages, also at 7%. Ga. Code Ann. §20-1408. Plaintiffs may present the court with calculations of the amount due. ...

6. Accordingly, the motions for reconsideration are DENIED. The motion for leave to amend is DENIED. The motion for oral argument is DENIED.

SO ORDERED, this 18th day of April, 1978.

/s/Harold L. Murphy
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JACK ROTHENBERG and

SHIRLEY ROTHENBERG

v. CIVIL ACTION

FILE NO. C77-151A

SECURITY MANAGEMENT

COMPANY, INC., et al.

(Filed July 3, 1978)

ORDER

This action arises from alleged violations of federal and state securities laws. On January 25, 1978, the court granted plaintiffs' motion for partial summary judgment. On April 18, 1978, the court denied the motion for reconsideration of defendants Security Management Co. and Bruce R. Davis.

Pending before the court is plaintiff's request for entry of judgment. Defendants have opposed this action on the grounds previously rejected in granting the motion for partial summary judgment and denying the motion for reconsideration.

Accordingly, there being no just reason for delay, the clerk is directed to enter judgment as to Count VIII in favor of Shirley Rothenberg against defendants Security Management Company, Inc. and Bruce R. Davis, jointly and severally, in the amount of $40,381.66 together with interest thereon at a rate of seven percent per annum until paid.

SO ORDERED, this 30th day of June, 1978.

/s/Harold L. Murphy

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

For the Fifth Circuit

No. 78-2631

D. C. Docket No. CA 77-151A

JACK ROTHENBERG and

SHIRLEY ROTHENBERG,

Plaintiffs-Appellees,

versus

SECURITY MANAGEMENT CO., INC.,

ET AL,

Defendants-Appellants.

Appeal for the United States District Court for the Northern District of Georgia

Before GOLDBERG, CHARLES CLARK and THOMAS A. CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for

the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

May 29, 1980

Issued as Mandate: July 30, 1980.

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

July 22, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-2631 - JACK ROTHENBERG &
SHIRLEY ROTHENBERG
vs. SECURITY MANAGEMENT
CO., INC., ET AL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc

has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,

CLERK

By /s/_____

Mary Beth Breaux

Deputy Clerk

cc: Mr. J. Michael Lamberth

Mr. Herbert S. Waldman

THIS GUARANTY given this 1st day of August, 1972 by BRUCE R. DAVIS and SECURITY MANAGEMENT CO., INC., jointly and severally, the undersigned (hereinafter called the "Guarantors") to induce all the future stockholders of record (hereinafter called the "Investors") of the Class B, Class C and Class D stock of Security Investment Properties, Inc. (hereinafter called the "Company") who are entitled to cumulative priority dividends pursuant to the Articles of Incorporation of the Company, to invest in the Company or otherwise become stockholders of the Company.

WHEREAS, in consideration of the foregoing, it is agreed:

1.

DURATION OF GUARANTY

This Guaranty shall remain in effect until one or more of the following events

occur:

(a) a public offering of Security Management Co., Inc.'s stock;

(b) a merger of Security Management Co., Inc., with a publicly-held corporation;

(c) at such time as the investor has received annual dividend of .5625 Dollars per share and in addition cumulative dividends, from date of investment, totaling $6.25 per share;

(d) liquidation or dissolution of the Company, except as provided as herein.

2.

GUARANTORS' OBLIGATION AS TO DIVIDENDS

The Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said

successors and assigns are allowed by the Articles of Incorporation of the Company) that the Company will distribute an annual cash dividend of .5625 Dollars per share, payable quarterly, for each outstanding share of Classes B, C and D cumulative stock held by the Investors of record. If, during any such quarter, the Company does not distribute such an amount, and such amount is due pursuant to the Articles of Incorporation of the Company, the Guarantors will, within thirty days after the end of such quarter, pay to the Investors of record an amount equivalent to the difference between the quarterly amount owed to said Investors and the divdends actually paid during that quarter. For the purpose of this paragraph the quarterly periods shall be computed from the beginning of the year following the incorporation of

the company.

Notwithstanding the foregoing, the Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of the Company) that the Company will, by December 31, 1972, have distributed as cash dividends an amount at least equal to .234375 Dollars, a sum equivalent to 5/12 of the annual dividend, for each outstanding share of Classes B, C and D cumulative stock held by the Investors of record. If the Company does not distribute such an amount, the Guarantors will, within thirty days after December 31, 1972, pay to the Investors of record an amount equivalent to the difference between .234375 per share, a sum equivalent to 5/12 of the annual dividend, and the dividends actually paid to the point

of time.

3.

GUARANTORS' OBLIGATION AS TO LIQUIDATION

The Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of the Company) that the Company will distribute, in case of liquidation and/or dissolution of the Company, an amount equivalent to the lesser of the following:

(a) $6.25 per share;

(b) cumulative dividends received in excess of the annual .5625 Dollars dividend per share subtracted from the $6.25 per share.

4.

WAIVER OF GUARANTORS

the Guarantors, jointly and severally, waive:

(a) notice of acceptance of this Guaranty by the Investors of record;

(b) notice of presentment, demand for payment, or protest of any of the Company's obligations; and

(c) all defenses, offsets and counter-claims which Guarantors may at any time have to any claim of the Investors of record against the Company.

5.

REPRESENTATION BY GUARANTORS

The Guarantors, jointly and severally, represent that, at the time of the execution and delivery of this Guaranty, nothing exists to impair the effectiveness of the liability of the Guarantors to the

Investors hereunder, or the immediate taking effect of this Guaranty as a sole agreement between the Guarantors and the Investors of record with respect to guaranteeing the Company's obligation to the Investors of record.

6.

REMEDY OF THE INVESTORS OF RECORD

The Investors of record may at its option proceed, in the first instance, against the Guarantors, jointly and severally, to collect any obligation covered by this Guaranty, without first proceeding against the Company.

7.

MODIFICATION OF AGREEMENT

The Whole of this Guaranty is herein set forth and there is no verbal or other written agreement, and no understanding or custom affecting the terms hereof. This Guaranty can be modified

only by a written instrument signed by the parties to be charged therewith.

8.

CONSTRUCTION AND BENEFIT

This Guaranty is made and delivered in, and shall be construed pursuant to the laws of, the State of Georgia, and is binding jointly and severally upon the Guarantors and their legal representatives, and shall inure to the benefit of the Investors, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of the Company).

IN WITNESS WHEREOF, the Guarantors have each set its hand and seal as of the day and year first above written.

/s/

BRUCE R. DAVIS

SECURITY MANAGEMENT

CO., INC.

BY /s/_____

Bruce R. Davis

TITLE President

(SEAL)

This Guaranty given this 1st day of August, 1972, by BRUCE R. DAVIS and SECURITY MANAGEMENT CO., INC., jointly and severally, the undersigned (hereinafter called the "Guarantors") to induce the future stockholders of record (hereinafter called the "Investors") of the Class B, Class C and Class D stock of Security Investment Properties, Inc. (hereinafter called "Properties") who are entitled to cumulative priority dividends pursuant to the Articles of Incorporation of Properties:

W I T N E S S E T H:

WHEREAS, Security Management Co., Inc., is a Georgia corporation authorized to do business within the State of Georgia and has offices at 420 14th Street, N.W., Atlanta, Georgia; and

WHEREAS, Davis is the sole stockholder of Security Management Co., Inc.,; and

WHEREAS, Davis has organized another corporation known as Security Investment Properties, Inc., with offices to be at 420 14th Street, N.W., Atlanta, Georgia; and

WHEREAS, Davis desires Investors to invest money and/or other property in Properties in exchange for Class C stock in Properties and for common stock in Security Management Co., Inc.; and

WHEREAS, the Investors are to receive an annual dividend on their investment in Properties; and

WHEREAS, the Guarantors desire to guarantee that Properties pays the annual dividend to said Investors; and

WHEREAS, the Guarantors desire that the Investors will receive the amount of their original investment from Properties in case of liquidation

or dissolution of Properties;

NOW, THEREFORE, in consideration of the premises and in consideration of the mutual benefits to all parties concerned, the parties hereto agree as follows:

1.

DURATION OF GUARANTY

This Guaranty shall remain in effect until one or more of the following events occur:

(a) a public offering of Security Management Co., Inc.'s stock;

(b) a merger of Security Management Co., Inc., with a publicly-held corporation;

(c) at such time as the Investor, his heirs, executors, administrators, transferees, or assigns has received an annual dividend of .5625 Dollars per share

and in addition cumulative dividends, from date of investment, totaling $6.25 per share.

(d) liquidation or dissolution of Properties except as provided herein.

2.

GUARANTORS' OBLIGATION AS TO DIVIDENDS

The Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of Properties) that Properties will distribute an annual cash dividend of .5625 Dollars per share, payable quarterly, for each outstanding share of Class B, C, and D stock held by the Investors of record. If, during any such quarter, Properties does not distribute such an amount to the Investors pursuant to the Articles of Incorporation

of Properties, the Guarantors will, within five (5) days after the end of such quarter, lend to Properties an amount of money equivalent to the difference between the quarterly amount owed by Properties to said Investors and the dividends actually paid during that quarter, whereupon Properties shall forthwith pay the same over to the Investors according to their respective entitlements as mentioned aforesaid.

Notwithstanding the foregoing, the Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of Properties) that Properties will, by December 31, 1972, have distributed to Investors as cash dividends an amount at least equal to .234375 Dollars, a sum equivalent

to 5/12 of the annual dividend, for each outstanding share of Class B, C, and D stock held by the Investors of record. If Properties does not distribute such an amount, the Guarantors will, within five (5) days after December 31, 1972, lend to Properties an amount equivalent to the difference between .234375 per share, a sum equivalent to 5/12 of the annual dividend, and the dividends actually paid to that time. Whereupon, Properties shall forthwith pay the same over to the Investors according to their respective entitlements as mentioned aforesaid.

3.

GUARANTORS' OBLIGATION AS TO LIQUIDATION

The Guarantors, jointly and severally, guarantee to the Investors of record, their successors and assigns (if said

successors and assigns are allowed by the Articles of Incorporation of Properties) that Properties will distribute, in case of liquidation and/or dissolution of Properties, an amount equivalent to the lesser of the following:

(a) $6.25 per share;

(b) cumulative dividends received in excess of the annual .5626 Dollars dividend per share subtracted from the $6.25 per share.

In the event that Properties is unable to comply with the foregoing provisions, for any reason whatsoever, Guarantors shall lend to Properties an amount of money necessary for Properties to satisfy such obligation, which sum Properties shall forthwith pay over to the shareholders entitled to priorities

under the Articles of Incorporation of Properties according to such shareholders' respective rights in and to such sum.

4.

REPAYMENT OF GUARANTORS

If the Guarantors pay any obligation of Properties under this Agreement, said payments are to be treated as loans to Properties and are to be repaid after such time as the Investors have received their annual dividend of .5625 Dollars per share and the Class A stockholders receive a like amount, and prior to any distribution of cumulative dividends to any of the stockholders of Properties. Cumulative dividends are those dividends as defined by the Supplement to Statement of Preferences, Limitations, and Relative Rights of Classes of Stock in Security Investment Properties, Inc.

5.

WAIVER OF GUARANTORS

The Guarantors, jointly and severally, waive:

(a) notice of acceptance of this Guaranty by the Investors of record;

(b) notice of presentment, demand payment, or protest of any of Properties' obligations; and

(c) all defenses, offsets and counter-claims which guarantors may at any time have to any claim of the Investors of record against Properties or which said Guarantors may have against Properties.

6.

REPRESENTATION BY GUARANTORS

The Guarantors, jointly and severally,

represent that, at the time of the execution and delivery of this Guaranty, nothing exists to impair the effectiveness of the liability of the Guarantors to the Investors hereunder, or the immediate taking effect of this Guaranty as a sole agreement between the Guarantors, Properties and the Investors of record with respect to guaranteeing Properties' obligation to the Investors of record.

7.

REMEDY OF THE INVESTORS OF RECORD

Each Investor of record may at its option proceed, in the first instance, against the Guarantors, jointly and severally, to collect any obligation converted by this Guaranty, without first proceeding against Properties.

8.

MODIFICATION OF AGREEMENT

The whole of this Guaranty is herein set forth and there is no verbal or other written agreement, and no understanding or custom affecting the terms hereof. This Guaranty can be modified only by a written instrument signed by the parties and consented to by the unanimous agreement of the Investors.

9.

CONSTRUCTION AND BENEFIT

This Guaranty is binding, jointly and severally, upon the Guarantors, their heirs, executors, administrators, transferees and assigns, and shall inure to the benefit of the Investors, their successors and assigns (if said successors and assigns are allowed by the Articles of Incorporation of Properties).

10.

This Agreement shall be construed in accordance with the laws of the State

of Georgia.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

SECURITY MANAGEMENT CO., INC. (SEAL)

BY /s/BRUCE R. DAVIS

Vice President

GUARANTOR

Attest:

/s/SIDNEY I. ROSE

Asst. Sec'y

/s/BRUCE R. DAVIS

BRUCE R. DAVIS

GUARANTOR

SECURITY INVESTMENT PROPERTIES, INC.

BY /s/BRUCE R. DAVIS

PROPERTIES

Attest:

/s/SIDNEY I. ROSE

Asst. Sec'y

attestation by Secretaries